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The Work of the Louisiana Appellate Courts for the 1966-1967 Term

A Symposium

PRIVATE LAW

PERSONS

Robert A. Pascal*

[*Author's note: The editors of the Review having requested that comments on decisions of the year under review be selective and brief, the discussion below has been limited mainly, though not entirely, to decisions chosen from among those considered by the writer to be at variance with the legislation.*]

DOMICILE OF THE MARRIED WOMAN

Under what circumstances, if any, may a married woman have an intrastate or interparish domicile different from her husband's? Article 39 of the Civil Code, long the only legislation on the subject, says no more than "a married woman has no other domicile than that of her husband." It does not admit of exceptions, not even one for the married woman separated from bed and board. For decades, nevertheless, the jurisprudence has held that the married woman may have a separate domicile after separation from bed and board or even before if her husband has given her cause justifying her living separate from him, and under R.S. 9:301 as it stood before 1960 it was implied that the wife living separate and apart under such circumstances as would warrant divorce under that legislation could have a separate domicile. Now article 3941 of the new Code of Civil Procedure, enacted in 1960, implicitly acknowledges that before a judgment of nullity, separation, or divorce a married woman may have a domicile other than her husband's, for it specifies that suits for annulment, separation or divorce may be brought at the domicile of either or at the last matrimonial domicile. For this reason alone the statement in *Consolidated Loans, Inc. v. Guerico*¹ is most certainly in error, for it declares the "married woman not judicially separated from her spouse can have no domicile other than that of her husband." On the other hand,

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1. 200 So.2d 717 (La. App. 1st Cir. 1967).

the statement in *Landry v. Landry*,² that unless the husband has given the wife cause for separation from bed and board she cannot have a domicile separate from his, conforms to the long-standing jurisprudence pronounced in spite of article 39 of the Civil Code; but it does not encompass the implication of R.S. 9:301, as it stood before 1960, and certainly it does not reflect the possibly broader implication of article 3541 of the Code of Civil Procedure that *in any case* husband and wife may have separate domiciles. Clarification through legislation would be helpful. The writer suggests, nevertheless, that in the light of the change in law implicit in R.S. 9:301 as it stood before 1960, which change certainly was very drastic, article 3941 may be interpreted to have been intended to mean that the husband and wife may have separate domiciles whenever they in fact live separate and apart.

SEPARATION FROM BED AND BOARD

The most important decision on the causes for separation from bed and board was *Sciortino v. Sciortino*.³ Article 138 of the Civil Code was amended in 1956 to allow separation from bed and board "when the husband and wife have voluntarily lived separate and apart for one year." In applying this cause the judiciary had not required the living separate and apart to be by mutual agreement, but had accepted living separate and apart by unilateral action. In *Sciortino* the court decided the words of the legislation demand that the separation have been by mutual consent, as the writer had suggested in 1956.⁴ It is unfortunate that R.S. 9:301 and its antecedent legislation were not similarly construed from the start so as to deny divorces where the living separate and apart was not by mutual consent. This legislation as presently interpreted is comfort and assurance to an abandoning spouse that he or she will be able to obtain a divorce whether or not the loyal spouse wishes a move in that direction and even against that spouse's opposition.⁵

ALIMONY AFTER DIVORCE

Article 160 of the Civil Code as amended in 1960 (pursuant to recommendations of the Louisiana State Law Institute) reads

2. 192 So.2d 237 (La. App. 4th Cir. 1966).

3. 188 So.2d 224 (La. App. 4th Cir. 1966), *writ denied*, 190 So.2d 237 (1966), on the basis of "no error of law."

4. Pascal, *Legislation Affecting the Civil Code and Related Subjects*, 17 LA. L. REV. 22, at 23, 24 (1956).

5. Complementing *Sciortino* is *Jardes v. Jardes*, 191 So.2d 645 (La. App. 2d Cir. 1966), which declares that a separation by mutual consent is not an abandonment.

that after divorce the wife may claim alimony if she "has not been at fault." In *Gamino v. Gamino*⁶ the wife had obtained a separation from bed and board for the cause of abandonment and a year later had obtained a divorce on showing non-reconciliation in that time. Against the wife's claim for alimony the husband introduced evidence probative of the wife's fault in disrupting the common life. The lower court ruled the separation judgment *res judicata* as to the cause for the separation, and therefore of the fault of the husband and non-fault of the wife for the purpose of applying Article 160. The majority of the court of appeal held, both originally and on rehearing, that the separation judgment was not determinative of the wife's freedom from fault. The dissenting opinion of Judge Chazez demonstrates the inconsistency of the decision with the legislation and its background and there is no need to labor the matter here. There can be little doubt the court believed the wife had deceived the court in the separation suit, and one is compelled to wonder whether the majority of the court permitted this fact to obscure its appreciation of the applicable legislation. Be that as it may, it may be predicted that if this construction of article 160 prevails suits for separation on the ground of abandonment will be used to obtain immediate separations *where legal cause does not exist and without prejudice to either party on the issue of alimony after divorce*. This in itself should be indication enough the legislation was not intended to have the meaning assigned to it by the court.

WAIVER OF FUTURE RIGHT TO ALIMONY

In *Nelson v. Walker*⁷ the Supreme Court uttered *dictum* which may have serious implications. The Court of Appeal for the First Circuit⁸ had declared null a partition of community assets containing a waiver of future alimony on the grounds that, among others, (1) the right to alimony in the future was not alienable and (2) the waiver so much formed an integral part of the partition that the latter could not be upheld independently of it. The Supreme Court reversed the decision declaring the waiver of alimony in any event not a major element in the partition, which therefore might be upheld without it. The object of the suit being the validity of the partition agreement as a

6. 199 So.2d 202 (La. App. 4th Cir. 1967).

7. 250 La. 545, 197 So.2d 619 (1967).

8. *Nelson v. Walker*, 189 So.2d 54 (La. App. 1st Cir. 1966).

division of former community assets, and not in any way a claim for alimony, the court could have stopped there and not discussed the validity of the alimony waiver. It went on, nevertheless, but therefore by way of *dictum* rather than necessary decision, to declare obliquely (a) that the right to claim alimony in the future was one which might be alienated or waived by one not under a contractual incapacity or disability and more directly (b) that although the alimony waiver in the particular instance was null at the time it was entered into because of an (alleged) disability of husband and wife under article 1790 of the Civil Code to contract with each other during marriage except in instances affirmed by law, this (alleged) nullity was relative rather than absolute, therefore ratifiable once the cause of the disability ceased to exist, and in fact had been ratified after the divorce of the parties.

The writer, in spite of a long jurisprudence on the point, denies that article 1790 declares husband and wife generally without power to contract with each other during marriage. The text of article 1790 states, on the contrary, that this and other disabilities mentioned therein "take place only in the cases specially provided by law, under different titles of this Code." The jurisprudence to the contrary, therefore, is invalid.⁹ Much more serious, however, is the conclusion that the right to claim alimony in the future under the general law on the subject might be waived as one established in favor of the person rather than for purposes of public order. No doubt other jurisdictions do permit such waivers, but it is submitted that alimony law is a matter of public order. It is one of the ways through which the societal obligation to provide for the support of those in need is distributed. Certainly those in need and not provided for by individual alimony obligors must be provided for from general funds. It is of the utmost importance therefore that the obligor not be permitted to contract with the potential dependent to obtain relief from his potential future obligation. The dependent not presently in need might be induced to waive his future right in return for a present gain only to find later that he is much in need and must seek relief from public sources. There may be much validity, too, to the argument advanced but not answered in an alimony case some years ago: if alimony is not

9. See the mention of this in last year's *Symposium* discussion, 27 LA. L. REV. 459 (1967) at note 14.

in the public interest, then to order anyone to pay alimony to another amounts to taking private property for private use.¹⁰

CRITERION FOR AMOUNT OF ALIMONY

Alimony to the wife after divorce is limited under article 160 of the Civil Code to one-third of the husband's income, though once reduced to a judgment obligation it may be enforced as any other out of any of the husband's assets. Alimony to ascendants and descendants, however, is measured only by the "wants" or needs of the dependent and the "circumstances" of those who are to pay it. *Sanders v. Sanders*¹¹ in effect construed "circumstances" to mean capital as well as income and accordingly awarded alimony in favor of children, even though their father was unemployed, on the basis of his having assets worth \$16,500.

Filiation

*Hibbert v. Mudd*¹² held that nothing in Louisiana legislation authorizes the acknowledgment of miscegenous children. Be that as it may, the question has since become of no importance. Under the recent United States Supreme Court decision in *Loving v. Commonwealth of Virginia*¹³ it seems certain that all laws discriminating among persons on the basis of race must be considered contrary to the fourteenth amendment to the United States Constitution.

Consistent with prior jurisprudence, but inconsistent with the legislation, is the decision in *Succession of Barlow*.¹⁴ A married woman conceived and gave birth to a child while living in open concubinage with a married man. After dissolution of their respective marriages, the adulterous parents married each other, acknowledged the child, and reared him as their own. It was argued that under article 198 of the Civil Code the adulterous child is legitimated by the marriage of its parents and their acknowledgment of him. The court agreed this was true, but declared article 198 inapplicable. The rationale of the court was that under article 184 and following the child was not the adulterous illegitimate offspring of the couple, but rather

10. See *Hays v. Hays*, 240 La. 708, 124 So.2d 917 (1960).

11. 250 La. 588, 197 So.2d 635 (1967).

12. 187 So.2d 503 (La. App. 3d Cir. 1966).

13. 388 U.S. 1 (1967).

14. 197 So.2d 682 (La. App. 4th Cir. 1967).

by conclusive presumption of law the legitimate child of the mother and of her husband at the time of its conception. Thus once more the judiciary refused to recognize that article 184 and following are not applicable merely because the mother is a married woman. Here, as the child was born in concubinage, the paramour is presumed to be its father under article 209 of the Civil Code. Under these circumstances there was no need for the husband of the mother to disavow the child and, had the child himself claimed the mother's husband to be his father, anyone at interest could have shown him to be the child of another man under article 197 of the Civil Code. The jurisprudence's misapplication of articles 184 and following has offered the color of legitimate birth to children even when the obvious facts, and more rational constructions of the law, were to the contrary. The writer submits these articles were never intended to impose legitimate filiation and all its liabilities on the husband of the mother when illegitimate paternity of the child was not in reasonable doubt under other presumptions of law.¹⁵

Custody, Paternal Authority, and Tutorship

Under the juvenile welfare legislation, administered in the juvenile courts only, the custody of a child surrendered for adoption, abandoned, neglected, or delinquent may be disposed of without reference to the civil legislation. Under the civil legislation, however, which alone may form the basis of proceedings in the civil courts, custody is an integral part of the law on paternal authority and tutorship. Thus it must be affirmed that under the civil legislation, and therefore in all actions for custody in the civil courts, the right to the custody of an unemancipated minor can be determined lawfully only with reference to the legislation on paternal authority and tutorship. For this reason the proceedings in *Murtishaw v. Brady*¹⁶ and *State ex rel. Bannister v. Bannister*¹⁷ must be considered to have been initiated irregularly. In *Murtishaw* the effort was that of a grandmother to obtain custody of a child detained by its stepmother after death of the father. The stepmother not being tutrix, the suit should have been one to *claim the tutorship* of

15. The reasoning of Cardozo, C. J., in construing similar New York legislation might be emulated with more justice. See *Matter of Findlay*, 253 N.Y. 1, 170 N.E. 471 (1930).

16. 191 So.2d 698 (La. App. 4th Cir. 1966).

17. 198 So.2d 196 (La. App. 1st Cir. 1967).

the child. In *Bannister* the situation was similar except that the stepmother already had been appointed dative tutrix and hence the proceedings should have been to remove the tutrix and appoint another. On the contrary, however, these suits were both improperly initiated as habeas corpus proceedings which, under article 3821 of the Code of Civil Procedure, may be used only to determine the *authority* of the respondent to detain the person in question. In *Bannister*, the habeas corpus suit should have ended once the respondent proved she was dative tutrix; and in *Murtishaw* it could have been shown the stepmother was not tutrix and therefore not entitled to custody, but the relator's right to custody was not properly before the court. It is proper, of course, for one having an established right to custody of a child as parent or tutor to initiate habeas corpus proceedings against third persons detaining the child without right. In this respect the habeas corpus proceeding in *Hoffpauir v. Meche*¹⁸ was used correctly by the relator-tutrix to recover the child from her husband, who had detained her unlawfully; but it was improper for the court, after ascertaining that the relator was tutrix of the child, to hear other evidence and "award custody" of the child to the detaining father. The child should have been returned to its tutrix-mother. Then, should the father have believed grounds to exist, he might have filed suit for removal of the tutrix and appointment of himself or another as tutor.

The present practice of the judiciary of considering custody as a matter which might be awarded without reference to the institutions of paternal authority and tutorship must have developed out of practices once proper under legislation now repealed. First, from Act 79 of 1894 until the repeal of R.S. 9:551-553 by Act 111 of 1956 the civil courts enjoyed a jurisdiction similar to that now exclusively in the juvenile courts and accordingly could consider the custody of a child without reference to paternal authority or tutorship if its neglect or other causes seriously endangered its physical, moral, or mental welfare. But the civil courts have not had this authority since 1956. Only the juvenile courts have it. Secondly, until 1924, because paternal authority continued after separation from bed and board, article 157 of the Civil Code permitted the custody of the child to be either settled amicably or awarded judicially to one of the spouses, and there was the possibility of simple custody

18. 180 So.2d 281 (La. App. 3d Cir. 1966).

proceedings between husband and wife. Today, however, since the amendment of articles 157, 246, and 250 in 1924,¹⁹ separation as well as divorce *terminates paternal authority*, the separated and divorced spouses *do not* have the right to "determine custody" amicably, the court *should* in every instance give the custody of the child to one of the parents, and that parent "shall of right [i.e., as a matter of law] become *tutor*" of the child.²⁰ From this point on, the initial award of custody after separation or divorce, the matter is one of tutorship. Accordingly, proceedings to change custody after the initial award following separation or divorce are tutorship proceedings, to be conducted as such under the substantive and procedural laws on tutorship.²¹ Thus in *Lucas v. Lucas*²² the proceedings were entirely irregular. After award of custody, and therefore *tutorship* to the mother and removal of her domicile to Mexico, the father abducted the child to Louisiana and there initiated proceedings for the child's custody. Under Louisiana legislation the only proper proceeding would have been in Mexico, at the domicile of the mother and child.²³ In the writer's opinion the court should have dismissed the father's suit, returned the child to the mother-tutrix on her demand, and compelled the father to follow the authorized procedure for removal of the tutor and appointment of another by filing his suit at the domicile of the mother-tutrix.²⁴ Similar observations might be made on the proceedings in *Ranson v. Mitchell*²⁵ and *Duplantis v. Bueto*,²⁶ in each of which the existence of a tutorship was ignored.

Minor's Delicts

Not patently erroneous is the decision in *Guidry v. State Farm Mut. Auto. Ins. Co.*,²⁷ according to which the father, though

19. By La. Acts 1924, Nos. 74, 72, and 196, respectively.

20. LA. CIVIL CODE art. 157 (1870), *as amended*, La. Acts 1924, no. 74.

21. See the author's discussion of this subject in *Symposium*, 27 LA. L. REV. 432-34 (1967).

22. 195 So.2d 771 (La. App. 3d Cir. 1967), *writ denied*.

23. LA. CODE OF CIVIL PROCEDURE art. 4034 (1960); compare *id.* arts. 4031, 4032.

24. The court of appeal reasoned that because article 10(5) of the Code of Civil Procedure asserts Louisiana courts may entertain custody proceedings as to a child present in the state, the Louisiana court might proceed as it did. In the writer's opinion the court failed to distinguish between the general power to hear custody cases, which Article 10(5) claims for the State and its judiciary, and the nature of the case at hand, which was in essence one for the change of the tutor.

25. 193 So.2d 359 (La. App. 1st Cir. 1966).

26. 186 So.2d 424 (La. App. 1st Cir. 1966).

27. 201 So.2d 534 (La. App. 3d Cir. 1967).

divorced from the mother, is liable for delicts of a minor living with the mother without a formal award of custody (and therefore tutorship under article 157 of the Civil Code) to her. The reasoning of the court was that inasmuch as the child had not been placed in the custody of one or the other parent by judicial decree paternal authority had not been terminated, and during paternal authority the father is liable for the minor's delicts. The writer does not believe that paternal authority can be said to continue after separation or divorce, but there is a lacuna in our legislation on liability for a minor's delicts between the dates of a separation or divorce and the award of the minor's custody to one of the parents. Article 2318, which renders the father while living, and after his death the mother, liable for the minor's delicts, became part of our law when divorce was unavailable except by special legislative act and separation from bed and board did not terminate paternal authority. Since the enactment of divorce legislation in 1828²⁸ and 1830²⁹ and in article 246 of the Revised Civil Code of 1870, divorce has terminated paternal authority; but it was only with the amendment of articles 157, 246, and 250 of the Civil Code in 1924³⁰ that separation from bed and board was given the effect of terminating paternal authority. There can be no doubt of this, however, for after the rendition of a separation or divorce decree neither parent, as parent, has any right in law to represent or have custody of the child; only on being given custody by judicial decree does a parent have tutorship of the child and therefore the right to represent him and to have his custody. Nevertheless, it may not be said that paternal authority continues during that period, for article 246 of the Civil Code declares that minors are subject to tutorship after separation or divorce of their parents. The writer suggests that the judiciary might have filled the lacuna better by holding the parent with actual custody liable *as if awarded custody* by decree, for if such custody had been decreed, that parent would have been tutor and liable.

A decision clearly distinguishable from the preceding is that in *Tripoli v. Gurry*.³¹ The mother had been given custody after judgment of separation from bed and board, and the subsequent divorce judgment made no mention of custody. The court ruled, and very correctly, that the mother *was tutrix* in spite of her

28. La. Acts 1828, No. 36.

29. La. Acts 1830, p. 48, § 9.

30. La. Acts 1924, Nos. 74, 72 and 196.

31. 187 So.2d 540 (La. App. 4th Cir. 1966).

having failed to qualify as such and liable for the child's delict committed after the divorce. Articles 157, 246, and 250 do not permit of any other conclusion. The language of article 157 is particularly strong: the parent given custody "shall of right [i.e., as a matter of law] become natural tutor or tutrix to the same extent and with the same effect as if the other party had died."

One more decision relating to parental and tutorial liability for minors' delicts must be mentioned. In *Williams v. City of Baton Rouge*³² it was held that a father would be held liable for the delict of his child committed in the course of employment by a third person. The court's rationale was that the parent is responsible vicariously as long as the minor is "residing with him," citing article 2318 of the Civil Code,³³ as long as the employer has not required the delictual act on the part of the minor. Yet the decision acknowledges that the jurisprudence has declared parents not liable when the minor has committed a delict while on active duty with the armed forces or a *posse comitatus*, though "residing with" the parents at the time, and apparently even when the delict has not been committed *under orders* of the authorities in question. The writer admits that the legislation, article 2318, does not by its language admit of exceptions to parental liability to the parties affected for delicts of minors residing with them, but submits that, in any event, there is insufficient basis for distinguishing between the delicts of a minor on active duty with the armed forces or a *posse comitatus* and one civilly employed.³⁴ Beyond this, however, it must be observed that whereas under article 2318 parents or tutors are liable to the victims for delicts of minors "placed by them under the care of other persons," this liability is only to the victims, and the parents may have "recourse against those persons" to whom they had entrusted the minor's care. If this is so, it would seem that, by analogy, the parents of an employed minor should at least be able to recover from the minor's employers for a delict committed in the course of the

32. 200 So.2d 420 (La. App. 4th Cir. 1966).

33. The court also quoted from *Watkins v. Cupit*, 130 So.2d 720 (La. App. 1st Cir. 1961), an excerpt which quotes a portion of 2 PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* (nos. 909-910), which contains much language quite inapplicable in Louisiana because of the differences between the French and Louisiana legislation on the subject.

34. The present form of article 2318 dates from 1825. Under the Digest of 1808, 3.4.20, parental and tutorial responsibility are not vicarious, but personal, attaching only when the parent or tutor has been negligent in surveillance of the minor or when the minor has acted in his presence.

employment. And even beyond this, the writer suggests parental and tutorial responsibility under article 2318 very logically may be considered not to attach when liability of the master or employer exists under article 2320 of the Civil Code. These liabilities would seem to be exclusive of each other. Each instance of vicarious liability exists for the protection of the victims, and if the victims of delicts by majors are sufficiently covered by the vicarious liability of the master or employer, there would seem to be no reason in law for the simultaneous liability of the parents or tutor for a minor's delicts.

RECOGNITION OF SISTER-STATE AND FOREIGN DIVORCES

Ever since the United States Supreme Court decision in *William v. North Carolina I*³⁵ the ostensible rule has been that a divorce, rendered in a sister-state or a United States territory in which the plaintiff was then domiciled and otherwise valid, is entitled to full faith and credit whether or not the defendant was before the court in the procedural sense; and a divorce rendered in a state in which the plaintiff was not domiciled may on proof of that fact be denied recognition³⁶ unless the issue of domicile itself has become *res judicata* under standards declared or implicit in later United States Supreme Court decisions. More particularly, the United States Supreme Court has said the issue of the plaintiff's domicile is *res judicata* if the defendant appeared in the suit and either *litigated*³⁷ or admitted³⁸ it, or, in *Johnson v. Muelberger*,³⁹ even if the defendant had neither litigated nor admitted the plaintiff's domicile, but had been served personally in the forum state. Furthermore, under *Johnson v. Muelberger*, not only the parties, but also strangers to the proceeding, are barred from attacking the divorce judgment for lack of the plaintiff's domicile at the forum if *under the forum state's law of res judicata* the issue cannot be raised by him or her. All of these criteria appear to have been confirmed later in *Cook v. Cook*.⁴⁰

It is in the context of the above-mentioned United States Supreme Court decisions and one other, to be mentioned later, that the Louisiana Supreme Court's decision in *Boudreaux v.*

35. 317 U.S. 287 (1942).

36. *Williams v. North Carolina II*, 325 U.S. 226 (1945).

37. *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

38. *Coe v. Coe*, 334 U.S. 378 (1948).

39. 340 U.S. 581 (1951).

40. 342 U.S. 126 (1951).

*Welch*⁴¹ must be appraised. The wife, domiciled in Louisiana, filed suit for divorce in Mississippi. The husband, also domiciled in Louisiana, filed a "waiver of service and entry of appearance" in the suit, as authorized by Mississippi legislation. On the day after the judgment of divorce the wife remarried. Later her second husband was killed and she sued for wrongful death. The defendant attacked the validity of the marriage to the decedent by pleading the nullity of the Mississippi divorce. At the wrongful death trial the wife admitted she had not been domiciled in Mississippi at the time of the divorce. On these facts the court of appeal⁴² declared the Mississippi divorce not entitled to full faith and credit, the issue of domicile not having become *res judicata* by reason of the absence of any "adversary proceeding" in which the defendant could have raised and litigated it. The Supreme Court reversed. The majority noted that the parties were before the court procedurally according to Mississippi law, that the defendant therefore had had an opportunity to litigate the issue of domicile, and that the judgment could not be attacked by anyone in Mississippi, and that for these reasons they believed themselves bound to give full faith and credit to the divorce under the United States Supreme Court decision in *Johnson v. Muelberger*. Justice Summers dissented, denying the divorce judgment could not be attacked under Mississippi law—a matter not commented on here—and alleging further that *Johnson v. Muelberger* envisioned "adversary proceedings" and not a mere waiver of citation and entry of appearance as authorized by Mississippi law and employed in this instance.

If the decision in *Boudreaux v. Welch* is required by the United States Supreme Court decisions discussed above, then the absurdity of pretending that divorce jurisdiction is dependent on the domicile of the plaintiff is manifest. In that event the parties must be considered as having succeeded in conferring divorce jurisdiction on a state which did not have it under the basic rule as stated in *William v. North Carolina I* even though they (or at least their attorneys) must have been fully aware of the disparity between the law and the facts of their situation. The decision in *Sherrer v. Sherrer* was certainly understandable, for the issue of domicile had been litigated, and there must be an end to litigation. Perhaps that in *Coe v. Coe* was

41. 249 La. 983, 192 So.2d 356 (1966).

42. *Boudreaux v. Welch*, 180 So.2d 725 (La. App. 1st Cir. 1965).

understandable for the same reason, for the defendant had at least, and apparently in good faith, litigated the merits of the suit if not the jurisdictional fact of domicile.⁴³ Nevertheless, the thrust of *Williams v. North Carolina I and II* seems to be that no state is to be denied the exclusive authority to legislate and to adjudicate on the marital status of its domiciliaries. If this is so, any procedure by which parties may by collusion or fraud deprive the plaintiff's state of domicile of the right to determine his marital status by its own law defeats the possibility of enforcing the primary rule. If the issue of domicile may not be raised after the defendant has contested the suit on its merits while admitting the plaintiff's domicile, as in *Coe v. Coe*, then cooperating spouses can choose effectively both the forum and the law applicable to the suit. This result is even more easily attainable if the defendant need not contest the suit at all after personal service at the forum, as in *Johnson v. Muelberger*, and is ridiculously easy of attainment if a "waiver of citation and entry of appearance," as in *Boudreaux v. Welch*, will suffice as much as personal service or appearance and contest on the merits. It is true that the rule of *Williams v. North Carolina I and II* continues to be applied in *ex parte* divorces, that is to say, when the defendant has not been served personally and does not cooperate in any way in the proceedings, but the defendant who wishes can make a mockery of the rule. This is a most unsatisfactory state of the decisions.

It is to be suspected that the United States Supreme Court might not have extended its decisions in *Sherrer*, *Coe*, *Johnson*, and *Cook* to include the situation in *Boudreaux v. Welch*. The last of the aforementioned decisions was rendered in 1951, and it would appear that the decision in *Granville-Smith v. Granville-Smith*,⁴⁴ rendered in 1955, affirms the principle that the requirement of the plaintiff's domicile at the forum may not be circumvented. The particular suit involved the validity of Virgin Islands legislation (1) presuming the plaintiff to be domiciled in the Virgin Islands if he or she had resided there six weeks and (2) declaring domicile immaterial to jurisdiction if both spouses were before the court personally. The United States Supreme Court reaffirmed the rule of *Williams v.*

43. The decision in *Biri v. Biri*, 192 So.2d 862 (La. App. 4th Cir. 1966), is consistent with *Coe v. Coe*.

44. 349 U.S. 1 (1955).

North Carolina I and proceeded to declare the Virgin Islands legislation invalid on the ground that the congressional legislation from which the Virgin Islands legislature derived its authority did not authorize it to enact laws which the states themselves were powerless to enact. If the Supreme Court will not permit the states and territories to vary the jurisdictional basis for divorce, it would seem logical to expect it would not tolerate the spouses doing so through misuse of the rule of *res judicata*.

A related question was presented in *Turpin v. Turpin*.⁴⁵ The wife, domiciled in Louisiana, sued for divorce in Arkansas, apparently in *ex parte* proceedings. The next day she married her second husband and nearly two years later her first husband married his second wife. Later, apparently believing her Arkansas divorce a nullity, the wife filed suit in Louisiana, her domicile, for divorce from her first husband. The first husband pleaded "*res judicata*." The court of appeal sustained the exception as one of estoppel, reasoning pragmatically that both the wife and her first husband had relied on the divorce judgment by remarrying and to declare the divorce invalid would violate "considerations of common decency." Contrary to *Turpin* is the decision in *Clark v. Clark*⁴⁶ rendered by the Court of Appeal for the Third Circuit. Parties then married to other persons both proceeded to obtain *ex parte* divorces from their respective spouses in suits filed in Mexico. Judge Frugé first held that if *ex parte* sister-state divorces are not entitled to full faith and credit, then certainly *ex parte* foreign divorces should not be recognized, and then proceeded to refuse to apply estoppel to deny the validity of the divorces.

The decision in *Clark* is much more reasonable, and much more consistent with the principles of Louisiana law than the decision in *Turpin*. Divorce jurisdiction is a matter of public order, against which the parties may not be allowed to prevail through their own connivance. Each state has the constitutional right to determine for itself and according to its own law the marital status of its domiciliaries. To refuse to permit the parties or others on any grounds to assert the nullity of a divorce is to aid those who would circumvent the law to do so,

45. 186 So.2d 650 (La. App. 2d Cir. 1966), writ denied, 187 So.2d 741, on the basis the judgment was correct.

46. 192 So.2d 594 (La. App. 3d Cir. 1966).

to create jurisdiction where none exists. A much sounder principle is implicit in article 113 of the Civil Code, according to which an absolutely null marriage may be attacked by the parties, the attorney general, or any interested party.

PROPERTY

*Frederick W. Ellis**

In *Jeanerette Lumber & Shingle Co. v. Board of Commissioners*,¹ the Supreme Court held that the article 665 levee servitude did not affect land not presently fronting on a navigable river and not part of an original riparian grant. There is no necessity to reiterate commentary which fully supports the decision.² Because the original justification for the servitude has been substantially eroded, it is hoped that in resolving remaining questions, the court will continue to apply article 665 restrictively.

*Wild v. LeBlanc*³ is an interesting decision, also discussed fully elsewhere,⁴ on the problem of continuous servitude. In accordance with prior rice country jurisprudence,⁵ the court held that irrigation drainage rights constituted a continuous servitude which could be acquired by ten-year prescription, even though acts of man to exercise the drainage took place off the servient estate. While resort to French writings about flushing commodes in Paris might furnish reasons to criticize the Louisiana jurisprudence recognizing that the necessity of acts off the servient estate do not render a servitude discontinuous, the practical need for protecting long-established drainage systems in Louisiana lowlands furnishes more serious reason to support the opinion. These needs were probably as much in the minds of the redactors of our Code in 1825 as they undoubtedly are in the minds of our judges today.

State v. Thompson,⁶ an expropriation decision, considered

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1. 249 La. 508, 187 So.2d 715 (1966).

2. Wolfe, *The Appropriation of Property for Levees: A Louisiana Study in Taking Without Just Compensation*, 40 TUL. L. REV. 233 (1966); Note, 27 LA. L. REV. 321 (1967).

3. 191 So.2d 146 (La. App. 3d Cir. 1966).

4. Note, 28 LA. L. REV. 134 (1967).

5. Discussed at 191 So.2d 146, 148 (La. App. 3d Cir. 1966).

6. 188 So.2d 753 (La. App. 2d Cir. 1966).